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The Changing Constitutional Role of the European Court of Justice

JULIO BAQUERO CRUZ*

1. INTRODUCTION

The process through which the founding Treaties of the European Communities came to function and be regarded as a constitution and the role of the Court of Justice in that process are well known. According to a widespread view, the Court would have been the main or even the only actor in the constitutionalization of the Treaties, transforming them into constitutional entities by virtue of some judgments of the 60s and 70s. For many, in those judgments the Court would have been excessively pro-integrationist, too audacious, almost “running wild”. At some point, a number of constitutional courts, in particular the German Constitutional Court with its Maastricht decision of 1993, would have voiced their concerns, tracing potential limits to judicially driven integration. As a result, the Court of the 90s would have become wiser, more self-restrained, at times even minimalistic – more like a court and less like an omnipotent legislator or “pouvoir constituant.” With the calling of the European Convention and the drafting of the Treaty establishing a Constitution for Europe, the Court would have been more than ever on a second plane, as if constitutional matters had finally returned to the political actors to which they belong.¹

* Marie Curie Fellow, European University Institute. This essay is based on the presentation I gave at the conference held by the International Association of Law Libraries at the European University Institute on September 5, 2005. The same ideas were presented at a luncheon seminar at the Robert Schuman Centre on October 24, 2005. A few notes have been added and some parts of the argument have been expanded or rectified. I am grateful to the participants in both venues, and in particular to Neil Walker and Bruno de Witte, for comments and criticism.

¹ For the conventional view on the role of the Court in the constitutionalization of the Treaty, see, for example, E. Stein, “Lawyers, Judges, and the Making of a Transnational Constitution”, *American Journal of International Law*, 1981, p. 1; H. Rasmussen, *On Law and Policy in the European Court of Justice*, Nijhoff, Dordrecht, 1986; J. H. H. Weiler, “The Transformation of Europe”, *Yale Law Journal*, 1991, p. 2403; K. Alter, *Establishing the Supremacy of European Law: the Making of an International Rule of Law in Europe*, OUP, Oxford, 2001; A. Stone Sweet, *The Judicial Construction of Europe*, OUP, Oxford, 2004. For my own perspective, see

For all its appeal, it seems to me that this view is exaggerated and partly misguided, that we need a less spectacular and more realistic account of the role of the Court in the constitutional dimensions of European integration.² I will try to sketch it here, referring to a few judgments which are representative of the main four periods in the Court's history: the 60s (foundational period), the 70s and 80s (consolidation), the 90s (in which a turning point clearly took place), and the new century. These leading cases stand for a predominant general trend that, in spite of some "eccentric" decisions, can be discerned in many other judgments of each period.

2. THE SIXTIES: FOUNDATIONS

In two judgments of 1963 and 1964, *Van Gend & Loos* and *Costa v ENEL*, the Court established the two essential features of Community law: direct effect and supremacy. In both, the Court approached the problem from a general perspective and gave a general answer. The arguments were largely similar and referred to the special nature of the Treaty establishing the European Economic Community.

In *Van Gend & Loos*, the Court declared that:
the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals....Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.³

In *Costa v ENEL*, the Court declared that the:
integration into the laws of each Member State of provisions which derive from the Community, and more generally the

my *Between Competition and Free Movement: the Economic Constitutional Law of the European Community*, Hart, Oxford, 2002, pp. 39-62.

² Curiously, that deformed view may have had some influence on how the Court sees itself and also on the case law.

³ Case 26/62, *Van Gend en Loos* [1963] ECR 1, at p. 12.

terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. [...] The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 (2) and giving rise to the discrimination prohibited by Article 7.... The law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.⁴

It has been often argued that the Court “invented” direct effect and supremacy, thus “transforming” the nature of the preliminary rulings procedure and that of the Community itself and “creating” a supranational constitution for the Community. All this would have been a bold and silent legal revolution, as the Member States would have never intended to endow the Treaty with direct effect and supremacy. Since the Court’s interpretation is very difficult to reverse, for unanimity is required to revise the Treaty, the Member States would have lost control of their creature. The judges of the Court would have replaced the States as “masters of the Treaty.”⁵

This story has been told so often that it has almost become true. And yet it is in part distorted. The Treaty did not expressly enshrine the principles of direct effect and supremacy, to be sure, but neither did it rule them out — as does Article 34(2)(b) of the Treaty on European Union when it states quite clearly that framework decisions relating to police and judicial cooperation in criminal matters “shall not entail direct effect”. The Treaty was mostly silent on these issues, but not completely so. Article 189 (now Article 249 EC) referred to the direct applicability of Regulations. Article 177 (now Article

⁴ Case 6/64 *Costa v ENEL* [1964] ECR 585, at pp. 593-594.

⁵ See, for example, the book of A. Stone Sweet cited in note 1, p. 66: “the Court initiated and sustained [the constitutionalization process] in the absence of express authorisation of the Treaty, and despite the declared opposition of Member State governments.” See also the book of K. Alter cited in note 1, *passim*, and her article “Who are the ‘Masters of the Treaty’? European Governments and the European Court of Justice?”, *International Organization*, 2000, p. 489 (with this author the language of “transformation orchestrated by the ECJ”, “bold”, “revolutionary”, “provocative” or “extremely controversial legal interpretations”, etc., is recurrent).

234 EC) established the preliminary reference procedure, which in any meaningful reading presupposed (and presupposes) direct effect. If individuals were not able to invoke provisions of Community law before national courts and the latter were not bound to apply them, why would national courts refer to the Court questions on the interpretation of Community law?

The argument that in the absence of direct effect the preliminary procedure could have always been used to obtain interpretations of Community law just in order to interpret the applicable national norm seems to me to be incorrect in view of the fact that the Treaty (and secondary law adopted since the inception of the Community) contained some very precise provisions that were not drafted to have “interpretational” value only. In addition, that view seems inconsistent with the “direct applicability” of Regulations, with the distinction between questions of interpretation and questions of validity and with the obligation to refer imposed on national courts of last resort. Why would a national court refer a question of validity of Community legislation if it was to be used only as an aid to the interpretation of national law? Why would national courts of last resort be bound to obtain a ruling from the Court if Community law had no direct effect and could only be used as a tool for the interpretation of national law?

Article 177 also pointed to supremacy: why would national courts of last resort be bound to refer questions of Community law if national law would prevail over Community law in case of conflict and the ruling of the Court would be disregarded? As direct effect, supremacy of Community law seems to fit better with the obligation to refer imposed on national courts of last resort. The opposite interpretation — that the ruling of the Court would be ignored if it was inconsistent with national law or that the very obligation to refer would only operate if it was compatible with national law — is possible but not quite plausible, unless one presumes that the drafters of Article 177 did not know what they were doing or wanted to design a self-defeating provision.⁶

These considerations suggest that in establishing the principles of direct effect and supremacy the Court was interpreting the Treaty, not rewriting it. Other interpretations were possible, to be sure. As in all hard

⁶ But they were quite conscious of the importance of Article 177 (for a reminiscence of the drafting of this provision, see P. Pescatore, “Les travaux du ‘groupe juridique’ dans la négociation des traités de Rome”, *Studia Diplomatica*, 1981, vol. XXXIV, p. 159, at p. 173).

cases, in *Van Gend en Loos* and *Costa v ENEL* there was a degree of indeterminacy in the law, an element of choice and even of chance. All things considered, however, the interpretations preferred by the Court were not as “bold and revolutionary” as some argue, for they accorded best with the aim and spirit of the process of integration and also with a Treaty that departed in many important respects from conventional international agreements.⁷ One fundamental difference was indeed the fact of having chosen to establish a permanent Court endowed with a large and obligatory jurisdiction, linked to national courts through the preliminary rulings procedure and entrusted with ensuring that “the law is observed” (Article 164 of the Treaty, now Article 220 EC), instead of an arbitral tribunal, a dispute settlement body or no system of adjudication at all. The choice for the Court was a result of pressure exerted by Germany and the Benelux countries during the negotiations of the Treaty of Paris against the French preference for an arbitral tribunal that would not compromise the position and powers of the High Authority (the forerunner of the European Commission).⁸ By the time of the negotiation of the Treaties of Rome, the Court was accepted by all as an established and necessary part of the Community system. Thus, the legal and institutional framework in which the Court operates was always more similar to that of a constitutional and a supreme court than to that of an international court. The preliminary rulings procedure also remains unique in international institutional law.⁹ It was indeed modelled on similar procedures existing in Germany and Italy for the constitutional review of legislation.

The Member States had therefore entrusted the Court with those issues of interpretation left more or less open in the Treaty, such as the status of Community law in national law. But the text of the Treaty contained

⁷ In this and the next section, I follow the argument of S. Acierno in “The European Court of Justice as a Constitutional Actor: A Reassessment” (unpublished paper).

⁸ See G. Isaac, *Droit communautaire général* (7th edition, Colin, Paris, 1999), p. 228: “Les négociateurs du traité C.E.C.A., sous l’influence allemande, semble-t-il, abandonnèrent très rapidement l’idée d’un tribunal arbitral conçu dans un esprit internationaliste au profit d’une juridiction qui se comporterait, au contraire, comme un juge interne de la Communauté”; J. Monnet, *Mémoires* (Fayard, Paris, 1976), p. 380: “l’arbitre et la procédure en deux temps que nous avions prévue disparaîtraient bientôt sous la pression des mêmes petits pays”.

⁹ With the exception of the Benelux (in which there is a preliminary rulings procedure; but it is a system inspired in ideas of integration and uniformity close to those of the Treaties of Paris and Rome). The “quasi-judicial” systems of the WTO and of regional organisations such as MERCOSUR and NAFTA seem quite “underdeveloped” when compared with the Community judicial system.

information enough as to make direct effect and supremacy the most compelling interpretations. In choosing them, the Court did not “transform” the Community legal order. There was nothing to transform yet. It simply clarified its nature through an interpretation of the relevant materials. The judgments were not “revolutionary”: the true “revolution” was due to the drafters of the Treaty, when they included a Court in the institutional system and linked it to national courts through the preliminary procedure, and to the Member States, when they ratified that Treaty. Direct effect and supremacy were not inevitable, but they were possible, and indeed likely to happen sooner or later.

It is true, nonetheless, that judicial interpretations of the Treaty are difficult to reverse, that they can be imposed on most Member States as long as one of them adheres to them. The story of direct effect and supremacy suggests, nonetheless, that they were never a serious problem for most Member States. Supremacy was at some point a difficult pillow to swallow for the highest courts of some Member States, not because they contested its legal correctness from the point of view of Community law, but as a result of their limited normative horizon and of the institutional stakes involved. For similar reasons a number of constitutional courts, like the German Constitutional Court, see supremacy as a doctrine in want of limits at the edges. So far the limits announced have mainly been potential and rhetorical. They tend to preserve for those courts the kind of Schmittian “last word” which would be the mark of the true sovereign. But that “last word” will probably rarely become a “performative utterance”: it is pronounced, but just in order to “say” something, not to “do” something.¹⁰ And as long as those potential limits are not put into effect, the putative “true sovereign” remains silent and harmless.

But the judicial story of supremacy is not the whole story. The principles of direct effect and supremacy were hardly a problem for the political branches of power in the six founding Member States: they reinforced their commitments to the benefit of all, giving them the sanctity of legal obligations.¹¹ Few among the six Member States may have found these principles unwarranted or unreasonable in view of the text of the Treaty they had agreed upon some years before. The fact that they did not revise the

¹⁰ For these categories, see J. L. Austin, *How to Do Things with Words* (Clarendon Press, Oxford, 1975).

¹¹ For a similar argument, see B. de Witte, “Direct Effect, Supremacy, and the Nature of the Legal Order”, in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (OUP, Oxford, 1999, p. 178, at p. 195).

Treaty to expressly incorporate or censure the case law of the Court on direct effect and supremacy is difficult to interpret. It may mean that all the Member States were happy with the case law but they did not care to amend the Treaty. It may also mean that one or more were happy with the case law and five or less were not, but there was no consensus to expressly incorporate the doctrines in the Treaty. It could also mean that they did not care much about the case law. But in my view it is farfetched to argue that the Member States wanted to leave “the situation open, with the [Court] claiming supremacy for EU law, while some national courts continue[d] to insist on evaluating the [Court]’s supremacy claim in light of national constitutional commitments.”¹² As a statement of fact it simply does not hold water: the constitutional case law on the potential limits to supremacy only came decades after *Costa v ENEL*, and it only exists in a minority of Member States. As a statement of law it is incompatible with the principle of Community loyalty enshrined in Article 10 (ex Article 5) EC and with the general obligation of good faith under public international law.

For the nineteen Member States that joined the European Community or Union after 1964, the argument of the difficulty to amend the Treaty cannot be made to de-legitimise these doctrines: the new States willingly joined the Community knowing that its legal order included the principles of direct effect and supremacy, and they knew the contours of those principles. Again, it seems farfetched to claim that they only acquiesced to an open situation with supremacy limited by the reservations voiced by national constitutional courts.¹³ Most of those reservations came after the accessions, and that interpretation would also be incompatible with fundamental principles of Community law and international public law.

What is more, the whole issue of the inaction of the Member States vis-à-vis the supremacy principle may well be meaningless. The important fact is that the Member States are bound by a Treaty according to which the Court (not national constitutional courts) is the institution responsible with ensuring that the law is observed in its interpretation and application. This means that they have entrusted that institution with the task of resolving those questions left open in the Treaty (among them, the issues of direct effect and

¹² M. Kumm and V. Ferreres Comella, “The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union”, *I-CON, International Journal of Constitutional Law*, 2005, p. 473, at p. 478 (note, however, that those national constitutional courts do not “evaluate” supremacy; they have merely threatened to do so in very exceptional cases).

¹³ *Ibid.*, p. 478.

supremacy) and in Community legislation which are brought to it in accordance with the various procedures foreseen in the Treaty. This is the system that the Member States agreed upon in the Treaties of Paris and Rome, rejecting other possibilities. In this context, it is quite daring to argue that the inaction of the Member States should to be understood as an acceptance of the supremacy principle limited by the potential reservations found in the jurisprudence of some national constitutional courts. Such an interpretation would lead to an unacceptable asymmetry of obligations and to discrimination on the basis of nationality among European citizens, since that kind of jurisprudence does not exist in all the Member States. The most reasonable view is to think that the case law of the Court stands as the correct interpretation of the Treaty, that the Member States are bound to respect it until there is a Treaty revision or a change in the case law.

Finally, when the Treaty of Amsterdam added to the basic Treaty a Protocol on subsidiarity and proportionality, the then fifteen Member States unanimously agreed to include in it a clause according to which “[t]he application of the principles of subsidiarity and proportionality [...] shall not affect the principles developed by the Court of Justice regarding the relationship between national and Community law”, that is, the principles of direct effect and supremacy. This clause, ratified by all the national parliaments and part of the constitutional law of the Community, amounts to an open recognition by the Member States of the principles of direct effect and supremacy, as developed by the Court.¹⁴ More recently, the Member States have agreed to enshrine expressly the principle of supremacy in the Treaty establishing a Constitution for Europe, declaring that it merely reflects the case law of the Court. The Constitutional Treaty is unlikely to enter into force, but supremacy has not been one of the reasons behind the negative results of the French and Dutch referenda.

3. THE SEVENTIES AND THE EIGHTIES: CONSOLIDATION AND DEVELOPMENT

The seventies and the eighties were a period of consolidation and development of the basic principles established in the sixties. Two cases stand out as the most important of this period.

In *Internationale Handelsgesellschaft*, of 1970, after recalling the principle of supremacy and holding that “the validity of measures adopted by

¹⁴ That is, without reservations or potential limits, and including national constitutional law. In their article, Kumm and Ferreres Comella surprisingly gloss over this important provision of primary law.

the institutions of the Community can only be judged in the light of Community law”, the Court affirmed that “respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community”.¹⁵ To preserve the supremacy, uniformity and effectiveness of Community law, the Court had to ensure that its compatibility with fundamental rights would not be assessed unilaterally in each Member State and according to different standards. Fundamental rights were to be protected within the Community legal order according to an unwritten catalogue deduced from the constitutional traditions common to the Member States. The Court would be in charge of protecting those rights.

In *ERTA*, of 1971, the Court held that “each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form they may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules or alter their scope.”¹⁶ This judgment recognised the existence of an implicit external competence of the Community each time an internal competence had been exercised. It was very important for a Treaty that at the time was almost silent regarding external competences. The principle of parallelism of internal and external powers was closely linked to the supremacy principle. It was based on the same concern for effectiveness, since unilateral international action of the Member States could impair what had already been done internally by the Community. *ERTA* and its progeny stood for a flexible approach to the interpretation of the competences of the Community.¹⁷ And in some cases the flexible logic of “implied powers” was also transposed to the sphere of internal powers.¹⁸

¹⁵ Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraphs 3-4. See also Case 29/69, *Stauder* [1969] ECR 419; Case 4/73, *Nold* [1974] ECR 491; Case 44/79, *Hauer* [1979] 3727

¹⁶ Case 22/70, *Commission v Council* [1971] ECR 263, paragraph 17.

¹⁷ See, for example, Joined Cases 3/76, 4/76 and 6/76, *Kramer* [1976] ECR 1308; Case 41/76, *Donckerwolcke* [1976] ECR 1934; Opinion 1/76 [1977] ECR 741; Opinion 1/78 [1979] ECR 2871.

¹⁸ Case 792/79 R, *Camera Care v Commission* [1980] ECR 119 (recognising the implicit power of the Commission to adopt interim measures in the context of Regulation 17/62, on the application of the competition rules to undertakings).

These and other leading judgments of this period led a number of commentators to contend that the Court was exceeding the boundaries of the judicial function. Some argued that the judicial “creation” of a fundamental rights doctrine undermined national constitutions, that the Court would have done it in order to enhance its own power and foster European integration, without a genuine concern for fundamental rights.¹⁹ Others believed that in *ERTA* the Court acted as “pouvoir constituant,” granting the Community certain powers that the Member States had never intended to surrender.²⁰

In my view, however, both judgments and the attendant lines of case law were logical and foreseeable consequences of the doctrines of direct effect and supremacy. They involved choices, of course, but the interpretations given by the Court fit better with the overall structure of the Treaty and with previous case law than the alternative interpretations.

With regard to fundamental rights, the Court was filling a gap in the Treaty that practice had revealed. And gap-filling is something that all courts eventually do and must do, with more or less intensity depending on the dynamism of the institutional system in which they operate, if they are to carry out their function properly.²¹ The Court was not undermining national constitutions or trying to enhance its own power, but protecting fundamental rights and at the same time safeguarding the integrity of Community law, as the protection awarded only operates within the scope of Community law. And it was doing it in a period of stagnation of the political institutions of the Community. In fact, the Member States were far from unhappy with this line of case law. As with direct effect and supremacy, all the Member States that have joined the Community after its establishment did so in full knowledge of the existence of that doctrine. In addition, in the Maastricht reform the Member States agreed to enshrine its main elements in the Article 6 of the Treaty on European Union. They have later promoted the drafting of a Charter of Fundamental Rights, whose legal fate is fatally linked to that of the Constitutional Treaty. Revealingly, Article I-9 of the Constitutional Treaty

¹⁹ See, for example, J. Coppel and A. O'Neill, “The European Court of Justice: Taking Rights Seriously?”, *Common Market Law Review*, 1992, p. 669. See also the response by J. H. H. Weiler and N. Lockhart, “‘Taking Rights Seriously’ Seriously: The European Court of Justice and its Fundamental Rights Jurisprudence”, *Common Market Law Review*, 1995, pp. 51-94 and pp. 579-627.

²⁰ See R. Joliet, *Le droit institutionnel des Communautés européennes*, Université de Liège, Liège, 1983, at p. 231.

²¹ On these issues, see my article “Constitutional Gaps in Community Law”, in *Melanges en hommage à Jean-Victor Louis*, Editions de l'Université de Bruxelles, Brussels, 2003, p. 29.

would have preserved the Court's doctrine of unwritten fundamental rights alongside the written rights contained in the Charter. As with direct effect and supremacy and also as a result of their limited normative horizon and of the institutional stakes involved, some national constitutional courts have expressed potential and exceptional limits to the fundamental rights doctrine of the Court.²² But the political branches of the Member States have largely agreed with it, for the same reasons that they like supremacy: it reinforces and guarantees the obligatory and uniform nature of their commitments. It prevents the fragmentation that would result from unilateral review according to varying standards in each Member State.

Implied powers, external and internal, seems to me to be a reasonable attitude to the interpretation of a Treaty which contains very general clauses on tasks and objectives and provisions drafted in an open-textured language, such as Articles 100 (now Article 95 EC) and 235 (now Article 308 EC). In the 1970s, there was little in the Treaty to suggest that competences were to be interpreted restrictively. It is difficult to argue, for example, that a provision such as Article 235 (Article 308 EC), which establishes that the Member States may unanimously decide to take action if it is "necessary to attain [...] one of the objectives of the Community", even if the Treaty has "not provided the necessary powers", should be interpreted restrictively. In addition, by requiring unanimity among the Member States that provision includes an adequate institutional safeguard against an undue expansion of powers. Even the subsidiarity principle, introduced by the Treaty of Maastricht, does not necessarily mean that competences are to be interpreted restrictively. Its wording may cut both ways.

There has been a degree of ambivalence in the reactions to the Court's case law on competences. The Member States seemed to be generally happy, while some of them perhaps contested an occasional ruling. And in successive Treaty reforms they generously added to the catalogue of Community powers, thus reducing the practical need for an expansive judicial interpretation of the existing powers. Almost simultaneously, however, they seemed to want to define better and limit the competences of the Community by introducing the principle of subsidiarity. It seems to me, however, that this was mainly done to assuage the concerns of national legislators and of the regional units of some Member States, which felt they were losing ground vis-à-vis national executives, and that it did not respond to an actual fear that the Community

²² See, for example, the *Fragd* decision of the Italian Constitutional Court (judgment 232/1989, *Foro italiano*, 1990, I, p. 1855). Comparable lines of case law exist in Denmark, France, Germany, Spain and Poland.

was acquiring too many competences to the detriment of the Member States, much less for reasons linked to the problematic democratic legitimacy of the European Union. The case law on competences was also difficult to swallow for the German constitutional court, once again for the same reasons that led it to establish limits to the case law on fundamental rights.²³

Thus, in my view the Court of the seventies and eighties was not acting as “*pouvoir constituant*,” but interpreting the Treaty, developing and consolidating what it had done in the sixties. And its interpretations seem to be those that accorded best with the text and structure of the Treaty.

4. THE NINETIES: A TURNING POINT

The nineties saw a turning point in the Court’s jurisprudence. I shall exemplify it with two leading cases that stand, as it were, before and after the turn. While the direction of the change is more or less clear, its causes are less so. They will be the central concern of this section.

In the first case, *Parliament v Council* (Chernobyl), the Court recognised the European Parliament a *locus standi* in annulment procedures, even though the Treaty did not expressly grant it and in spite of the fact that the Court itself had denied it two years earlier.²⁴ As could be expected, some argued once again that the Court was going too far, acting “against the Treaties”.²⁵ In fact, had there been no overruling of a prior case law, the judgment of the Court would have been less spectacular. The Treaty was silent on the issue; it was not “against” the granting of a *locus standi* to the European Parliament. The Court was filling a “procedural gap” in the Treaty, adapting it to new institutional circumstances. The argument based on the institutional balance and the rule of law, according to which the Court should be in a position to ensure that the institutional balance is respected and that this is impossible if the European Parliament cannot defend its institutional prerogatives, seems to me to be convincing enough as long as one rejects a flat or merely textual conception of interpretation and accepts values, general

²³ See its Maastricht decision of 1993 (BVerfGE, 89, 155).

²⁴ Case C-70/88, *Parliament v Council* (Chernobyl) [1990] ECR I-2041. The earlier judgment is Case 302/87, *Parliament v Council* (Comitology) [1988] ECR 5615.

²⁵ T. C. Hartley, *Constitutional Problems of the European Union*, Hart, Oxford, 1999, p. 36: “the Treaty provides no authority for the judgment”; “the Court is prepared to go against the Treaties where it feels that the constitutional development of the Community so requires.”

principles and structures as valid interpretive materials alongside the text. Besides, the Treaty of Maastricht confirmed that jurisprudential development, amending Article 230 EC.²⁶

Some years later, however, the Court began to show itself as much more cautious in hard cases and when confronted with constitutional gaps, particularly in cases related to Community powers. The leading decision here is Opinion 2/94, in which the Court declared that the Community was not competent to adhere to the European Convention on Human Rights, that a mere interpretation of the Treaty could not grant such a competence and that it had to be amended to make accession possible.²⁷ This pronouncement looks as a severe curtailment of the implied powers approach to Treaty competences. As we have seen, fundamental rights protection is implicit in the Treaty as interpreted by the Court. Accession to the European Convention on Human Rights would enhance that protection with an additional external review. Requiring a Treaty amendment for such a step shows a rather restrictive approach to the issue of competences. A similar approach to competences can be seen in the tobacco advertisement case,²⁸ on the scope of Article 95 EC, or in Opinion 1/94 (on the World Trade Organisation),²⁹ which rejected a dynamic interpretation of the common commercial policy and reduced the operative scope of *ERTA*. Such a restrictive turn did not take place in areas in which competence where not directly at stake. “Restrictive on competences, expansive on individual rights” seemed to be the motto of the Court after the turn of the 90s.

The causes of this turn may be many. Some have suggested that the Court was reacting to the Maastricht decision of the German Constitutional Court.³⁰ In that decision, the German Constitutional Court denounced that the Court’s case law on Community powers was too expansive, that the use of *effet utile* was excessive, that interpreting the Treaty was one thing and amending it another, and that the Court could not achieve through interpretation what should be done through Treaty revision. In addition, the

²⁶ *Parliament v Council*, cited in note 24, paragraph 25.

²⁷ Opinion 2/94 [1996] ECR I-1759.

²⁸ Case C-376/98, *Germany v Council* [2000] ECR I-8419.

²⁹ Opinion 1/94 [1994] ECR I-5281. On this Opinion, see my “Disintegration of the Law of Integration in the External Economic Relations of the European Community”, *Columbia Journal of European Law*, 1997, p. 257.

³⁰ Decision cited in note 23. See, for example, A. Peters, *Elemente einer Theorie der Verfassung Europas*, Duncker & Humblot, Berlin, 2001, p. 425: describing Opinion 2/92 as a reaction to the Maastricht decision of the German Constitutional Court (“möglicherweise in Reaktion auf das Maastricht-Urteil”).

German Constitutional Court announced that a Community act that in its view overstepped the boundaries of Community competence would not be applicable in Germany even if the Court of Justice had considered that it did not exceed the competences of the Community.

This view is quite attractive, to be sure, and some language found in Opinion 2/94 that recalls the language of the German Constitutional Court seems to confirm it. But it may not be the whole truth. It seems to me that there is a more important and legitimate reason for the Court's course of action than just responding to the German Court's questionable and disruptive unilateral pressure. Let me first try to explain why I consider the pressure coming from the German Constitutional Court to be questionable and disruptive, and then I shall try to put forward my alternative and more legitimate explanation for the turn in the case law of the European Court.

Some may indeed argue that the interaction between the German Constitutional Court and the Court of Justice that allegedly resulted in Opinion 2/94 and in a more restrictive approach to the interpretation of Community competences was the virtuous consequence of a horizontal dialogue between courts, of "heterarchical" and not hierarchical relations, an example of constitutional pluralism in action.³¹ The German Constitutional Court would have voiced essential concerns common to several courts and national legal orders, and this would have led to a needed adjustment of Community law.

For all its popularity, this view seems to me to be misguided. Pluralism has much to commend it in the realm of politics, but not so much in that of judicial activity, where the rule of law, legal certainty and the effective protection of individual rights may be endangered by the lack of clear relationships among judicial institutions. "Heterarchical" and "horizontal" are instinctively appealing notions while "hierarchy" and "vertical" sound old-fashioned and reactionary, but leaving fashions aside one has to admit that a legal *order* will probably decay and collapse sooner or later without a minimum degree of hierarchy regarding its application. In this sense, with ordinary interpreters — virtuosi do not abound in these fields — and without

³¹ For these approaches, see, for example, N. MacCormick, "Beyond the Sovereign State", *Modern Law Review*, 1993, p. 1; M. Kumm, "Who is the Final Arbiter of Constitutionality in Europe?", *Common Market Law Review*, 1999, 356; N. Walker, "The Idea of Constitutional Pluralism", *Modern Law Review*, 2002, p. 317; M. Maduro: "Contrapunctual Law: Europe's Constitutional Pluralism in Action", in N. Walker (ed.), *Sovereignty in Transition*, Hart, Oxford, 2003, p. 501.

that minimum degree of hierarchy the “contrapuntal” law of Miguel Maduro may easily become dissonance or outright cacophony, with dramatic consequences for the situation of individuals.³² A judicial dialogue bearing on what the European Union can and cannot do and which may result in the annulment of important policy measures should take place in a structured way, not informally and by unilateral statements. In the absence of a better system, the preliminary rulings procedure of Article 234 EC provides the framework in which such a structured dialogue may — and in some cases should — take place. It allows the Community institutions and all the Member States to intervene. The obligation of national courts of last resort to refer questions of Community law to the Court of Justice is the indispensable hierarchical element within that framework — but one which is seldom respected. The Belgian *Cour d’arbitrage* has recently stated that “differences of interpretation among judicial bodies concerning the validity of Community acts and the validity of the legislation that implements them in national law endanger the unity of the Community legal order and put into question the Community general principle of legal certainty.”³³ For those reasons, the *Cour d’arbitrage* referred to the Court all its doubts concerning the validity of the framework decision on the European arrest warrant. I wonder what the advocates of pluralism make of the simple but irresistible force of that argument.

Fortunately, there seems to be a more legitimate reason for the Court’s turn in the 90s than just responding to the unilateral pressure of the German Constitutional Court. After 1986 the Treaty had been amended twice (Single European Act and Maastricht) and another intergovernmental conference was in view. Those frequent and substantial Treaty amendments,

³² For a practical example, see the judgment of 27 April 2005 of the Polish Constitutional Court on the European arrest warrant (Case P 1/05), paragraph 9: “The Tribunal is not relieved of [its] obligation [to review the conformity of normative acts with the Polish Constitution] where the allegation of non-conformity with the Constitution concerns the scope of a statute implementing European Union law.” This statement seems to extend to European Union law as a whole, not being limited to the third pillar, in which the lack of judicial protection (to my knowledge Poland has not yet accepted the jurisdiction of the Court pursuant to Article 35 EU) may justify the exceptional intervention of the Constitutional Court.

³³ Judgment of 13 July 2005 (No 124/2005), paragraph B.10 (my translation): “Des différences d’interprétation entre les instances judiciaires concernant la validité d’actes communautaires et la validité de la législation qui en constitue la mise en œuvre en droit interne compromettraient l’unité de l’ordre juridique communautaire et porteraient atteinte au principe général du droit communautaire de la sécurité juridique.”

unprecedented in the history of European integration, signalled a new impetus after a long period of stagnation. They added several new powers to the European Community. The Court may have felt that it no longer needed to be so expansive on competences and so active in filling constitutional gaps, as the drafters of amending treaties could now put an end to any undesirable shortcoming concerning the powers of the Community.³⁴ It is not easy to say whether this was an adequate course of action for the Court, and whether constitutional interpretation should vary depending on the frequency and intensity of constitutional amendment. Indeed, one may argue that the Treaty already provides adequate — indeed extremely strong — institutional safeguards to prevent undue expansion of Community competences, that in most cases the competence issue is used to attack policy outcomes by the losing minority, and that the intervention of the Court may seriously disrupt an already fragile legislative process. It seems, indeed, that the Court's intervention on competences has remained marginal, being limited to a few spectacular cases. Thus, the Court is no longer as expansive or deferential on competences as it used to be, but it is not restrictive either: it tries to interpret the Treaty striking a balance between the interests of the Member States and those of the Community. "Balanced on competences, expansive on rights" may be a more exact definition of what the Court was doing in those years.

In sum, the Court's turn in the 90s was not or at least not just a reaction to the threats of the German Constitutional Court in order to achieve judicial peace in Europe. It was mainly trying to find its place in a more dynamic Union.

5. THE COURT OF THE NEW CENTURY: A TAME COURT?

The mood and motto "balanced on competences, expansive on rights" may well apply to the Court of the new century. One may indeed question whether a new period has started and argue that it is only a continuation of the period that started in the 90s. It is too early to tell, but new circumstances may lead us into a distinct period with its own characteristics: the judicial development of the normative content of European citizenship and the contradictions that may arise from it; the European Convention and its indirect influence on the Court; the enlargement and its impact on the Court's organisation.

³⁴ I have developed these ideas in more detail in my article "Constitutional Gaps in Community Law", cited in footnote 21.

European citizenship, which some saw as an almost empty legal institution, has finally revealed that it is quite full of meaning.³⁵ This is not the place to present the various judgments in which European citizenship has shown to be useful for those that have it.³⁶ Let me just mention the *Baumbast* case, of 2002, in which the Court declared that Article 18 EC, which enshrines free movement and non-discrimination for all European citizens, has direct effect, giving rise to individual rights that national courts must protect. In addition the Court held that restrictions to those rights have to pursue a legitimate objective and be proportionate. And when reviewing the national measure that restricted Mr Baumbast's rights, the Court applied a strict proportionality test.³⁷

This judgment and other judgments of the new century are clearly expansive on the rights of European citizens. But they are problematic for three main reasons.

First, at the same time the case law on citizenship flourishes, the Court is becoming restrictive in cases involving third-country nationals, such as *Khalil*, *Panayotova* and *Akrich*, especially when their situation is not linked to a European citizen. Indeed, in recent cases in which the Court was not restrictive concerning the rights of third-country nationals, they invariably derived their rights from European citizens.³⁸ As a matter of fact, the Court was protecting the rights of European citizens, and those of third-country

³⁵ See, for example, J. H. H. Weiler, *The Constitution of Europe*, Cambridge University Press, Cambridge, 1999, p. 326 (questioning the "added value" of European citizenship and arguing that most of the rights attached to it "predated Maastricht").

³⁶ For a detailed analysis, see S. O'Leary, "Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union", in G. de Búrca (ed.), *EU Law and the Welfare State*, OUP, Oxford, 2005, p. 39, at pp. 66-76. See, in particular, Case C-184/99, *Grzelczyk* [2001] ECR I-6193; Case C-456/02, *Trojani* [2004] ECR I-7573; C-224/02, *Pusa* [2004] I-5763 (with a very interesting Opinion of Advocate General Jacobs).

³⁷ Case C-413/99, *Baumbast* [2002] I-7091, paragraphs 84 to 94.

³⁸ Case C-95/99, *Khalil and others* [2001] ECR I-7413 (interpreting restrictively Regulation 1408/71, on social security, in a case involving stateless persons and refugees; see my note "Khalil e.a.: les réfugiés et les apatrides face au droit communautaire", *Cahiers de droit européen*, 2002, p. 501); Case C-327/02, *Panayotova* [2004] I-11055 (interpreting restrictively the establishment provisions of the Europe Agreements, against the Opinion of Advocate General Maduro); Case 109/01, *Akrich* [2003] I-9607 (implicitly overruling C-370/90, *Singh* [1992] ECR I-4265, which favoured third-country nationals married to Community nationals).

nationals only as a consequence.³⁹ In some cases the double standard applying to European citizens and third-country nationals is not the Court's fault, but the consequence of the applicable provisions, which foresee different legal situations for third-country nationals and European citizens. But the perusal of other cases, such as those I have mentioned, gives one the impression that the Court would have done more with the texts it was interpreting if they concerned European citizens, and that part of the double standard is due to the case law, not to the law. This suggests that in this field the Court may no longer be as open as in the past. Such a change would betray the universalistic ideals behind the Treaty of Rome and risk to transform the Union into a fortress of European citizens.

Second, attracted by salient non-economic issues of citizenship, competences and fundamental rights, the Court may be paying less attention to the case law on economic rights and competition law. Cases on free movement of economic factors are now generally left to chambers of five judges. Competition law is seen as a matter for the Court of First Instance, with the Court exercising a very limited role in appeals and in a few preliminary references. This reduced attention may be among the causes of certain inconsistencies found in the case law.⁴⁰ It seems to me, however, that it may not be a good idea to leave the economic case law on a second plane. Many courts are protecting fundamental rights in Europe, where the role of the Court should only be complementary. In contrast, the Court is the only judicial institution in the Union that can build and maintain a consistent body of case law on the free movement and competition rules. Those provisions remain fundamental in a Treaty which is no longer exclusively economic but

³⁹ See, for example, C-60/00, *Carpenter* [2002] I-6279 (interpreting Community law as to prevent the deportation of the Philippine wife of a European citizen; on this judgment, see S. Acierno, "Fundamental Rights and the Limits of the Community Legal Order," *European Law Review*, 2003, p. 399); C-200/02, *Zhu and Chen* [2004] I-9925 (protecting the rights of the third-country parents to stay with their child, who is a European citizen).

⁴⁰ With regard to free movement law, see Case C-416/00, *Morellato* [2003] I-9343 (applying *Keck* in a very dubious manner) and Case C-71/02, *Karner* [2004] I-3025 (declaring that there is no restriction and yet providing guidance to the national court on Community fundamental rights outside of the scope of Community law). With regard to competition law, see Case C-2/01 P, *BAI and Commission v Bayer* [2004] I-23 (a judgment rendered on appeal that did not really clarify or consistently develop the notion of agreement within the meaning of Article 81 EC nor resolve the contradictions among chambers of the Court of First Instance in Case T-41/96, *Bayer v Commission* [2000] ECR II-3383 and Joined Cases T-123/96 and T-143/96, *Volkswagen v Commission* [1999] ECR II-3663).

still predominantly so. They may deserve more attention on the part of the Court.⁴¹

Third, the Court's expansive approach on the individual rights of Community citizens, which are mainly liberal and negative rights of free movement, may be in contradiction with its more cautious approach to social rights and social issues. In *Allonby*, to give only one example, the Court did not see anything unlawful from the point of view of Community law in an outsourcing scheme that discriminated severely regarding pay against part-time workers, most of whom were women. As interpreted by the Court, Article 141 of the Treaty, which provides for equal pay of men and women, was of no use against such a scheme.⁴²

As to the European Convention, it is true that for a long time its proceedings left the Court on a second plane as regards Community constitutional law. In addition, the Court may have been more restrained in some of its interpretation of the Treaty, thinking that the Convention would solve a number of important problems. The obvious example is *Unión de Pequeños Agricultores*, in which the Court rejected Advocate General Jacobs and the Court of First Instance's proposals to modify the interpretation of Article 230 EC in order to ease direct access of private parties to the Court.⁴³ Recalling the language of Opinion 2/94, the Court stated that such a change would require a constitutional revision, since the text of Article 230 EC did not permit the proposed interpretation.⁴⁴ The Convention and the intergovernmental conference did indeed open up somewhat the conditions of Article 230 EC.⁴⁵ This sort of dynamics may have occurred in other areas, as in the case concerning Eurojust, in which the Court declared inadmissible an

⁴¹ On the importance of economic law for the constitutional law of the European Union, see my book cited in note 1, pp. 63 to 103.

⁴² Case C-256/01 *Allonby* [2004] ECR I-873. See also Case C-320/00, *Lawrence and others* [2002] I-7325; and Case C-191/03, *McKenna*, judgment of 8 September 2005, not yet reported (also interpreting restrictively Article 141 EC).

⁴³ Case C-50/00 P, *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677; Case T-177/01, *Jégo-Quéré/Commission* [2002] ECR II-2365.

⁴⁴ *Ibid.* (*Unión de Pequeños Agricultores*), paragraph 45: "While it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force."

⁴⁵ See Article III-365(4) of the Treaty establishing a Constitution for Europe.

action of a Member State against an act of Eurojust for lack of jurisdiction.⁴⁶ The main reason was that Article 230 EC did not refer to the acts of that organ, a silence that would not have been so decisive for the Court some years ago. The Court was perhaps reassured by the fact that the Constitutional Treaty includes all agencies and organs of the Community within the purview of the action for annulment.⁴⁷ After the negative results of the French and Dutch referenda, however, it is likely that the Treaty establishing a Constitution for Europe will not come into force. The conservative interpretations that the Court has adopted will now be entrenched and prevent constitutional change in future case law. *Unión de Pequeños Agricultores*, for example, will stand as the leading case on Article 230 EC for years to come, preventing a jurisprudential opening of the *locus standi* of private parties.

Do these cases really prove that the Court adopted a deferential attitude on issues which were being discussed at the Convention? If so, was that an appropriate course of action? These are hard questions, for in periods in which constitutions are being amended constitutional courts are in a difficult position. One may think that the Court was not being deferential, that it would have rendered the same judgments anyway, regardless of the Convention. However, a renewed dynamism after the negative referenda in France and the Netherlands seem to suggest that the Court was indeed hibernating, at least in part, throughout the constitutional process.⁴⁸ If the Court was deferential one might argue that its deference was undue, for the Convention and the intergovernmental conference were acting on a different plane and could have departed from the interpretations given by the Court before the Constitutional Treaty was signed. Even if a measure of deference were justified, however, the Court's low profile throughout the Convention may have been excessive, resulting in a number of entrenched interpretations that may foreclose future change. Considering the uncertainty of the ratification process, it would perhaps have been better for the Court to leave some doors open, or at least unlocked.

Finally, the Eastern enlargement may prove to be a key factor for the future development of the Court, mainly for institutional reasons. The idea of

⁴⁶ Case C-160/93, *Eurojust*, judgment of 15 March 2005 (not yet reported; see the Opinion of Advocate General Maduro, which was not followed by the Court).

⁴⁷ See Article III-365(1) of the Treaty establishing a Constitution for Europe.

⁴⁸ See Case 105/03, *Pupino*, judgment of 16 June 2005, not yet reported (an important development concerning Title VI of the EU Treaty) and Case C-176/03, *Commission v Council*, judgment of 13 September 2005, not yet reported (annulling a framework decision adopted under Title VI of the EU Treaty because it should have been adopted pursuant to the EC Treaty).

a court with a small number of judges has been rejected. The Treaty of Nice expressly enshrined the principle of one judge per Member State. The Convention and the Constitutional Treaty did nothing to change that. The Court is now composed of twenty-five judges and eight Advocates General. The Grand Chamber — which will decide most of the important cases, while the plenary will only decide a few cases of fundamental significance if any — is made up of thirteen judges, but only the president of the Court and the presidents of five-judge chambers are permanent members. The rest are taken from a list of judges, one going out and a new one coming in at each weekly general meeting of the Court.⁴⁹ After one or more weeks the majority may change on sensitive issues, for example on social or immigration issues, on competences or fundamental rights. The Court is no longer this or that court, but several courts that change stochastically after each general meeting. This may lead to inconsistencies in the case law or else to a “thin” or “poor” case law designed to avoid those inconsistencies by reducing the normative content of judgments.⁵⁰ This odd system may not be easily changed, as no Member State would want its judge to be permanently excluded from the Grand Chamber. By rejecting a small court and allowing for the composition of the Grand Chamber to be different every week, the Member States have created institutional conditions in which it will be very hard for the Court to have a strong, clear, coherent and authoritative voice on the interpretation of European Union law. Curiously enough, the Court was the institution in which it was easier to avoid the negative effects of enlargement: the presence of judges of the Court, Advocates General and judges of the Court of First Instance gave ample field to trade positions among the Member States and allow the maintenance of a small, strong and more effective Court. The institutional consequences of the recent Eastern enlargement may thus have

⁴⁹ See Article 11ter of the Rules of Procedure of the Court.

⁵⁰ By “poor” or “thin” jurisprudence I refer to those judgments in preliminary cases in which the answer and reasoning of the Court are so scant that the case is almost left undecided and the Community law provision is given a vague interpretation. Judgments on appeal may also be “thin” or “poor” as a result of the Court’s formalistic approach to its review of judgments of the Court of First Instance. These judgments may reflect the need to accommodate a great number of opinions within the Court. Diluting the normative content of judgments, more judges may agree with them. But this may serve justice badly, and national judges may no longer use the preliminary rulings procedure when they should, for they will not want to wait two years or more to receive an answer that does not get them closer to the solution than they were when they referred the preliminary question. On these issues, see my article “De la cuestión prejudicial a la casación europea: Reflexiones sobre la eficacia y la uniformidad del Derecho de la Unión”, *Revista Española de Derecho Europeo*, 2005, p. 35.

entailed a silent, perhaps unintended, but after all quite effective “taming” or even “packing” of the Court.⁵¹

6. CONCLUDING REMARKS

The conclusion is simple. First, many accounts have unduly exaggerated the role of the Court in the constitutionalization process. The Court has been important in developing a constitutional law for the European Union, to be sure, but the drafters of the Treaty and the Member States, in various Treaty reforms, have remained central actors of that process. The drafters of the Treaty departed in many respects from the traditional international agreement and included in its structure a Court and many constitutional seeds that the Court could later use. It was, besides, foreseeable that the Court would use them. In addition, besides explicitly or implicitly accepting the main elements of the constitutional case law of the Court, the Member States have also contributed to the constitutional development of the European Union independently from the Court (the addition of new competences and the powers given to the European Parliament are two clear examples of constitution-making outside of the Court). As a result, neo-functionalism may not be as well suited to explain the judicial development of Community constitutional law as even its fiercest critics admit.⁵² Second, the turn of the nineties in the general trend of the case law has been often misinterpreted: in my view, the Court was mainly trying to find its place in a more dynamic European Union, not just responding to the illegitimate and disruptive unilateral pressure of the German Constitutional Court. Third, the present Court remains in many respects similar to that of the nineties, “balanced on competences, expansive on rights”, but it is faced with new difficulties. One of them, I have argued, is its own organisation after the Eastern enlargement, which may prevent it from having a strong and clear constitutional voice in future.

⁵¹ I use “tame” in the fourth sense of the *Shorter OED*: “Lacking animation, force or effectiveness; having no striking features; uninspiring, insipid, dull.” For “packing”, reminiscent of a famous episode in US constitutional law, see the fourth definition of the *Shorter OED*: “Select or make up (a jury, deliberative body, etc.) in such a way as to secure a biased decision or further a particular end.”

⁵² See A. Moravcsik, “The European Constitutional Compromise and the Neofunctionalist Legacy”, *Journal of European Public Policy*, 2005, p. 349, at p. 363: “the ECJ — a rare area in which neofunctional claims have consistently been validated empirically.” On this issue, see G. de Búrca, “Rethinking Law in Neofunctionalist Theory”, *Journal of European Public Policy*, 2005, p. 310.

All these interesting themes, however, may distract our attention from a fundamental fact. The European judicial model is not perfect. It is, indeed, structurally deficient and highly imperfect. And the actual health of the rule of law in the European Union may be very fragile as a result. The obligation of national courts of last resort to refer issues of Community law to the Court, which is the element that should hold the system together, is often disregarded. At present there seems to be no effective mechanism to enforce that obligation. The degree of penetration of Community law into the legal cultures of many Member States remains marginal. Most of the time, the intervention of the Court is haphazard and stochastic, not systematic. National courts often ignore Community law altogether and do not always look at the Court's case law for authoritative guidance on its interpretation. Community law is not always applied when and as it should be applied. To that extent, the rule of law fails in the Union, Community law, legal positions and individual rights remain hypothetical and constitutionalization, with direct effect and supremacy, is only theoretical, partial and imperfect.⁵³

⁵³ Rather than a remedy to these deficiencies, *Köbler* (Case C-224/01 [2003] I-10239), which confirmed the principle of State liability for decisions of national courts of last resort in manifest breach of Community law, seems to me a reflection of the deep crisis affecting the Community judicial system. For a detailed analysis and a "utopian" proposal to resolve them introducing a "European appeal" as a complement to preliminary references, see my article cited in note 50.